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No. 84-1287

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOUIS LIPHETE, ET AL., PETITIONERS

v.

MERRITT STIERHEIM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the ineligibility of certain alien parolees for the homestead tax exemption accorded permanent residents by Florida law violates the Supremacy, Equal Protection, or Due Process Clauses of the United States Constitution.

TABLE OF CONTENTS

Page

Statement 1

Discussion 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Bernal v. *Fainter*, 467 U.S. 216 9

Cabell, v. *Chavez-Salido*, 454 U.S. 432 9

Cooke, In re, 412 So.2d 340 ..... 3, 9

Dandridge v. *Williams*, 397 U.S. 471 10

De Canas v. *Bica*, 424 U.S. 351 ..... 5, 8

Elkins v. *Moreno*, 435 U.S. 647 ..... 7, 8, 9, 11

Graham v. *Richardson*, 403 U.S. 365 5

Hines v. *Davidowitz*, 312 U.S. 52 9

Holley v. *Lavine*, 553 F.2d 845, cert. denied, 435 U.S. 947 7

Plyler v. *Doe*, No. 80-1538 (June 15, 1982) 2, 6

Plyler v. *Nelson*, No. 84-5240 (June 26, 1985) 2, 6

Juarrero v. *McNayr*, 157 So.2d 79 ..... 3, 4, 9

Kaplan v. *Tod*, 267 U.S. 228 7

Kwong Hai Chew v. *Colding*, 344 U.S. 590 6

Leng May Ma v. *Barber*, 357 U.S. 185 ..... 2, 6, 7

Lok v. *INS*, 681 F.2d 107 8

Page

Cases—Continued:

Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 10

Mathews v. *Diaz*, 426 U.S. 67 5

Nyquist v. *Mauclet*, 432 U.S. 1 9

Personnel Administrator v. *Feeney*, 442 U.S. 252 10

Richardson v. *Belcher*, 404 U.S. 78 11

Schweiker v. *Wilson*, 450 U.S. 221 10

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 ..... 6, 9

Sudomir v. *McMahon*, 767 F.2d 1456 7

Sugarman v. *Dougall*, 413 U.S. 634 9

Toll v. *Moreno*, 458 U.S. 1 ..... 5, 7, 8, 9

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 10

Village of Belle Terre v. *Boraas*, 416 U.S. 1 10

Vlandis v. *Kline*, 412 U.S. 441 10

Washington v. *Davis*, 426 U.S. 229 10

Weinberger v. *Salfi*, 422 U.S. 749 11

Constitution and statutes:

U.S. Const. :

Art. VI, Cl. 2 (Supremacy Clause) 4, 5, 7, 8
Amend. V (Due Process Clause) 4
Amend. XIV (Equal Protection Clause) 4

Page

Constitution and statutes—Continued:

Fla. Const. Art. VII, § 6(a) 3

Fla. Stat. (1983):

§ 196.012 3
§ 196.031(1) 3
§ 196.015 3

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* :

§ 101(a)(15)(A), 8 U.S.C. 1101(a)(15)(A) 7
§ 101(a)(15)(G), 8 U.S.C. 1101(a)(15)(G) 7
§ 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A) 1, 2, 6, 7
§ 235(b), 8 U.S.C. 1225(b) 1

Pub. L. No. 96-422, 94 Stat. 1799 *et seq.* 3

§ 501(b), 94 Stat. 1809 7
§ 501(e), 94 Stat. 1810 6

42 U.S.C. 1382c(a)(1) 7

42 U.S.C. 1382c(B)(ii) 7

Miscellaneous:

H.R. 1510, 98th Cong., 2d Sess. (1984) 6

H.R. 3080, 99th Cong., 1st Sess. (1985) 6

S. 529, 98th Cong., 2d Sess. (1983) 6

S. 1200, 99th Cong., 1st Sess. (1985) 6

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. a. Section 235(b) of the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. 1225(b), provides that "[e]very alien * * * who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." Section 212(d)(5)(A) of the Act, 8 U.S.C. 1182(d)(5)(A), further provides that, while this inquiry is being conducted, the Attorney General "in his discretion" may parole into the United States any alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." See

generally *Jean* v. *Nelson*, No. 84-5240 (June 26, 1985), slip op. 2, 8. This parole mechanism thus provides a device that makes it possible to avoid confining the alien at the border — or turning him away altogether — while his immigration status is unresolved. See generally *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958).

Under Section 212(d)(5)(A), however, parole "shall not be regarded as an admission of the alien" to the United States. When, in the Attorney General's judgment, the purposes of the parole have been served, the statute directs that "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." See generally *Jean*, slip op. 2.

b. During the late 1970's and early 1980's, substantial numbers of undocumented aliens lacking required entry visas arrived at ports in Florida from Haiti and Cuba; in the spring of 1980 alone, well over 100,000 Cubans were brought to Florida through a "sealift" originating in Mariel Harbor, Cuba. Pet. App. A40 (statement of Victor H. Palmieri, U.S. Coordinator for Refugee Affairs). See generally *Jean*, slip op. 1, 2. These aliens were unable to benefit from existing provisions of the immigration laws dealing with refugee and asylum status. See Pet. App. A41 (statement of Victor H. Palmieri, U.S. Coordinator for Refugee Affairs). The prospect of turning away altogether this sudden and sizable influx of aliens nevertheless was seen as both inequitable and impractical (see *id.* at A40, A42).

In response to these considerations, immigration authorities informally created a special status, designated as "Cuban/Haitian Entrants (Status Pending)," to identify undocumented Cubans and Haitians arriving in the United States prior to October 10, 1980. See Pet. App. A42 (statement of Victor H. Palmieri, U.S. Coordinator for Refugee

Affairs); *id.* at A32 (cable from the Commissioner of Immigration and Naturalization). While persons fitting into this category were to be "paroled or granted extended voluntary departure or stay of deportation, as appropriate" (*ibid.*), aliens granted the status were not deemed to have been legally "admitted" to the United States.[1]

2. a. The Constitution of the State of Florida provides that every permanent resident of the State is entitled to claim a homestead tax exemption of up to $5000 on the assessed value of his permanent residence. Fla. Const. Art. VII, § 6(a). See Fla. Stat. § 196.031(1) (1983). Florida law defines "permanent residence" as the place at which a person has "his true, fixed, and permanent home and principal establishment to which, whenever absent, he has the intention of returning." Fla. Stat. § 196.012 (1983). Intent to establish permanent residence within the State is determined as a factual matter, in the first instance by state property appraisers. Fla. Stat. § 196.015 (1983). The Florida courts have held, however, that aliens who have not been admitted for permanent residence in the United States cannot, as a matter of state law, form an intent to establish permanent residence in Florida. See *In re Cooke*, 412 So.2d 340 (Fla. 1982); *Juarrero* v. *McNayr*, 157 So.2d 79 (Fla. 1963).

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[1]In recognition of the inability of states and localities to adequately provide for this new population of displaced persons, aliens in the Cuban/Haitian Entrants (Status Pending) category were permitted to qualify for various forms of federal financial assistance, including certain types of Social Security benefits (see Pet. App. A42-A43 (statement of Victor H. Palmieri, U.S. Coordinator for Refugee Affairs)). In addition, Congress enacted legislation to assist localities in educating both the children of aliens in this category and the adult aliens themselves. Pub. L. No. 96-422, 94 Stat. 1799 *et seq.*

b. Petitioners are Haitian nationals who were paroled into the United States, and were classified by the Immigration and Naturalization Service (INS) as Cuban/Haitian Entrants (Status Pending); they have lived in Florida since 1978, and have owned a home in Miami since 1982 (Pet. App. A9). In May 1983, petitioners were denied a homestead tax exemption by the Dade County tax appraiser because they lacked permanent resident visas (*id.* at A11-A12). After unsuccessfully appealing this initial administrative determination, petitioners brought suit for declaratory and injunctive relief in circuit court for Dade County, alleging that the State's denial of their application violated the Due Process, Equal Protection and Supremacy Clauses of the United States Constitution.

The court dismissed the complaint (Pet. App. A5-A7). It found petitioners' claims controlled by *Juarrero* v. *McNayr, supra*, explaining that petitioners "are legally incapable of declaring a Florida home their permanent residence" (Pet. App. A6). The Florida Third District Court of Appeal affirmed without opinion (*id.* at A4). The Florida Supreme Court subsequently dismissed petitioners' appeal for want of jurisdiction (*id.* at A1).

DISCUSSION

Petitioners contend that the decision below conflicts with this Court's rulings construing the Supremacy, Equal Protection and Due Process Clauses. Their argument, however, is grounded on a misunderstanding both of their immigration status and of Florida law. Moreover, the Florida court's decision has implications only for the discrete group of aliens who were placed in the Cuban/Haitian Entrants (Status Pending) category prior to October 10, 1980. Further review therefore is not warranted.[2]

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[2]Respondents are incorrect, however, in asserting (Stierheim Br. in Opp. 4-6, 15-18; Miller Br. in Opp. 17-29) that the decision below rests on an independent and adequate state ground. From the outset,

1. This Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). See, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Graham* v. *Richardson*, 403 U.S. 365, 377-380 (1971). It thus has declared repeatedly that " 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.' " *Toll*, 458 U.S. at 12-13, quoting *De Canas* v. *Bica*, 424 U.S. 351, 358 n.6 (1976). At the same time, however, the Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted." *De Canas*, 424 U.S. at 355. Resolution of a Supremacy Clause claim such as the one in this case therefore requires a close examination of the immigration status conferred upon the claimant by federal law. See *Toll*, 458 U.S. at 13.

Here, petitioners' argument that the Florida homestead rule conflicts with federal law (Pet. 10-16, 18-19, 25-26) is premised on a misleading description of their immigration status. Contrary to petitioners' assertions (see, *e.g.*, Pet. 7, 14, 15, 16, 25), aliens in the Cuban/Haitian Entrants (Status Pending) category have not been given "permission to remain in the United States indefinitely" (Pet. 14) or "the right to remain permanently in the United States" (Pet. 25), either by the President[3] or by Congress. Nor have aliens in

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petitioners' contention on the merits has been that the Florida law of permanent residence itself is inconsistent with federal law. See Pet. App. A13-A16. The courts below necessarily interpreted federal law in rejecting that claim.

[3]Although petitioners make frequent reference (see, *e.g.*, Pet. 25) to a "Presidential Order" or "Executive Order" establishing their status, at no time has a President of the United States issued any such order. See pages 2-3, *supra*.

petitioners' category yet been accepted "as permanent residents of the United States" (Pet. 7) or designated a "non-deportable class" (Pet. 14). Instead, they have been paroled into this country temporarily pursuant to the Attorney General's discretionary authority under Section 212(d)(5)(A) of the Act. See pages 2-3, *supra*. No congressional action has been taken to alter that status.[4]

As the Act itself expressly provides (see pages 1-2, *supra*), and as this Court repeatedly has recognized, such parole is not to be "regarded as admission of the alien" to the United States. *Jean* v. *Nelson*, No. 84-5240 (June 26, 1985), slip op. 2. It is, instead, simply a substitute for "needless confinement" at the border that "was never intended to affect an alien's status" (*Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958)); a grant of parole thus does not "legally constitute an entry [into the United States] though the alien is still physically within the United States." *Id.* at 188. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). And this distinction is a meaningful one: paroled aliens are subject to exclusion proceedings and are accorded a far lesser set of rights than are aliens who have been admitted to the United States. See *Leng May Ma*, 357 U.S. at 187; *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953).[5] For purposes of federal law, petitioners' status accordingly is no

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[4]Congress recognized the status of such aliens as parolees in the United States when it made them eligible for educational benefits. Pub. L. No. 96-422, § 501(e) 94 Stat. 1810. See note 1, *supra*.

[5]As petitioners note (Pet. 15), the President has proposed and Congress has considered adjusting the status of aliens in the Cuban/Haitian Entrants (Status Pending) category. See Pet. App. A36 (Social Security Program Instruction, June 27, 1980), A42 (statement of Victor H. Palmieri, U.S. Coordinator for Refugee Affairs); H.R. 3080, 99th Cong., 1st Sess. (1985); S. 1200, 99th Cong., 1st Sess. (1985); H.R. 1510, 98th Cong., 2d Sess. (1984); S. 529, 98th Cong., 2d Sess. (1983). To date, however—as the "Status Pending" portion of the classification designation suggests—no such action has been taken. And in the absence of

different from that of an alien who is " 'still in theory at the boundary line and has gained no foothold in the United States.' " *Leng May Ma*, 357 U.S. at 189, quoting *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925).

In these circumstances, petitioners' reliance on *Toll* v. *Moreno, supra*, and *Elkins* v. *Moreno*, 435 U.S. 647 (1978), is misplaced. Those cases involved a challenge to a University of Maryland policy that denied the dependents of so-called "G-4" nonimmigrant visa holders the "in-state" status that would have entitled them to reduced tuition.[6] The Court pointed to two factors in holding that the University's

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legislation, Section 212(d)(5)(A) of the Act mandates that persons such as petitioners be treated as aliens temporarily in the United States who have not been lawfully admitted.

Petitioners suggest (Pet. 14-15) that they should be considered permanent residents of the United States as a matter of federal law because they are considered to be "permanently residing in the United States under color of law" for purposes of eligibility for certain welfare benefits. See, *e.g.*, 42 U.S.C. 1382c(a)(1)(B)(ii); Pet. App. A36. To the extent that Cuban/Haitian Entrants (Status Pending) meet this test, however, it is because deportable or excludable aliens whom the INS has specifically determined not to deport or expel are considered to be in the United States "under color of law." See *Holley* v. *Lavine*, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978). Compare *Sudomir* v. *McMahon*, 767 F.2d 1456 (9th Cir. 1985). An alien thus may satisfy the "under color of law" test without being a lawful permanent resident of the United States for purposes of the immigration laws—or of the Florida law at issue here. Indeed, Congress expressly authorized the President to grant Cuban/Haitian Entrants (Status Pending) a variety of federal benefits (Pub. L. No. 96-422, § 501(b), 94 Stat. 1809)—an action that would have been unnecessary had such aliens been eligible for benefits in the absence of a special executive dispensation.

[6]G-4 aliens are those employed in the United States by international organizations; along with diplomats, such aliens are excepted from the general requirement that nonimmigrants maintain a residence abroad that they do not intend to abandon. See 8 U.S.C. 1101(a)(15)(A) and (G). Primarily for this reason, G-4 aliens may, as a matter of federal law, become domiciliaries of the United States. See *Toll*, 458 U.S. at 6 & n.8; *Elkins*, 435 U.S. at 664-668.

policy violated the Supremacy Clause. In light of Congress's decision to permit G-4 aliens to acquire domicile in the United States (see note 6, *supra*), the Court reasoned that "the State's decision to deny 'in-state' status to G-4 aliens, *solely* on account of the G-4 alien's federal immigration status, surely amounts to an ancillary 'burden not contemplated by Congress' in admitting those aliens to the United States." *Toll*, 458 U.S. at 14 (emphasis in original). And the Court explained that Congress had exempted G-4 aliens from federal and, in many instances, state and local taxes (*id.* at 14-16); the University's policy — which charged a higher tuition to out-of-state residents specifically because they did not pay state income taxes — necessarily would frustrate the federal policies that underlay the tax exemption if applied to G-4 aliens (*id.* at 16).

Neither of these considerations is present in this case. Far from being eligible for domicile in the United States, aliens in the Cuban/Haitian Entrants (Status Pending) category are not even deemed to have been legally admitted to this country. Cf. *Lok* v. *INS*, 681 F.2d 107, 109 (2d Cir. 1982). And the federal government has taken no steps, as it had for the G-4 alien complainants in *Toll* and *Elkins*, to relieve petitioners of the burdens that state law imposes.

Against such a background, the decision of this Court that is most clearly on point is *De Canas* v. *Bica, supra*, where the Court rejected a Supremacy Clause challenge to a California law that prohibited the employment of undocumented aliens. The Court there noted that the California

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[7]Petitioners are incorrect in suggesting (Pet. 14-15) that the Florida provision at issue here is inconsistent with Executive Branch policy. As noted above (see note 1, *supra*), federal financial assistance has been provided to Cuban/Haitian Entrant (Status Pending) aliens expressly to *spare* the states the burden of caring for such aliens while the aliens' immigration status is unresolved.

statute "adopt[ed] federal standards" (424 U.S. at 355), and accordingly declined to invalidate the law absent a demonstration that it "burden[ed] or conflict[ed] in any manner with federal laws or treaties." *Id.* at 357 n.5; see *id.* at 363-365. The same analysis is applicable here: Florida simply declines to treat as permanent residents of the State aliens who, under federal immigration law, are "treated as if stopped at the border." *Mezei*, 345 U.S. at 215. Nothing in such a scheme "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[8]

2. Petitioners' equal protection contentions also are flawed. The cases cited by petitioners (Pet. 22), it is true, stand for the proposition that state alienage classifications must be subjected to strict scrutiny unless they involve attempts to define the state's political community. See, *e.g.*, *Bernal* v. *Fainter*, 467 U.S. 216 (1984); *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 438-439 (1982); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). But that principle comes into play when the statute at issue is "directed at aliens and * * * only aliens are harmed by it." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). In contrast, as the Court has noted in the Supremacy Clause context, the Court's decisions applying strict scrutiny have not addressed "a State's imposition of a burden on all individuals sharing a common relevant characteristic, of whom only some are aliens." *Toll*, 458 U.S. at 17 n.25.

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[8]We note, however, that the Florida scheme may conflict with federal law as it applies to other categories of aliens. It appears, for example, that Florida accords permanent resident status only to aliens who have been granted permanent resident visas by the federal government. See *Juarrero*, 157 So.2d at 81. To the extent that Florida would deny permanent resident status to persons such as G-4 aliens who may become domiciliaries of the United States, that portion of the Florida system may not survive *Toll* and *Elkins*.

The Florida classification at issue here falls into this latter category: it is based on permanent residence, not on alienage. Many aliens are permanent residents of Florida (see generally *In re Cooke, supra*); many United States citizens are not. Concededly, Florida's homestead tax exemption rules, which turn on the applicant's intention permanently to reside in the State, make it impossible for alien parolees to obtain the benefits of the tax exemption. But that is a function not of their alienage per se, but rather of the restrictions imposed on parolees by federal law. And as this Court repeatedly has explained, absent a showing of discriminatory intent — which petitioners have not established — a regulation's differential impact on individuals having a "suspect" characteristic does not warrant the application of strict scrutiny. See, *e.g., Personnel Administrator* v. *Feeney*, 442 U.S. 252, 272 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

In the absence of strict scrutiny, petitioners' equal protection challenge cannot succeed. Persons who have no legitimate expectation that they will be permitted to remain in the United States (whatever their subjective intentions) plainly stand on a different footing from those — whether citizen or alien — who are domiciled in this country. And by distinguishing between these groups of persons, the Florida system presumably serves to encourage long-term home ownership in the State, while benefitting those who can be expected to contribute to the State over a substantial period. These purposes undoubtedly are legitimate (cf. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 19 (1974)), and are rationally furthered by the state classification at issue here. See, *e.g., Schweiker* v. *Wilson*, 450 U.S. 221, 234-235 (1981); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 486-487 (1970).

3. Finally, petitioners' due process contentions do not warrant further review. Relying on *Vlandis* v. *Kline*, 412 U.S. 441 (1973), petitioners argue (Pet. 16-18, 22-24) that the Florida scheme makes use of an unconstitutional "irrebuttable presumption" because it denies parolees an opportunity to establish that they are permanent residents of Florida. In fact, however, petitioners "have no due process claim under either *Vlandis* or [*Weinberger* v.] *Salfi* [,422 U.S. 749 (1975),]" for the challenged "presumption" — that parolees are not entitled to claim permanent residence or domicile in the United States — is "universally true." *Elkins*, 435 U.S. at 661. As explained above, under both federal and Florida law aliens in the Cuban/Haitian Entrants (Status Pending) category may not establish domicile in this country. Whatever the applicability of *Vlandis* in other contexts,[9] then, that case provides petitioners no support here.

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[9]As this Court repeatedly has made clear, legislation that satisfies equal protection standards " 'is perforce consistent with * * * due process requirements.' " *Salfi*, 422 U.S. at 770, quoting *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). The question for due process purposes therefore "is whether [the legislature], its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Salfi*, 422 U.S. at 777. As explained above (at 9-10), the Florida scheme does not deny petitioners equal protection; they accordingly cannot make out a violation of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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